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No. 87-911

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE CONTINENTAL GROUP, INC.,
CONTINENTAL CAN COMPANY, INC.,
CONTINENTAL PACKAGING COMPANY, INC., and
KMI CONTINENTAL INC.,

Petitioners,

v.

CECIL MCLENDON, DON VANDERTULIP,
JIMMIE CARTHARN, JR. and KONRAD TROJNIAR,
on their own behalf and on behalf of all others similarly situated,

Respondents

and

HONORABLE H. LEE SAROKIN,
United States District Judge
for the District of New Jersey,

Nominal Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Edwin C. Thomas, III
Bell, Boyd & Lloyd
Three First National Plaza
70 West Madison St.
Chicago, Ill. 60602

Samuel W. Braver
Buchanan Ingersoll, P.C.
57th Floor, 600 Grant St.
Pittsburgh, PA 15219
Attorneys for Petitioner

Of Counsel:
Daniel M. Carson
Associate General Counsel
Continental Can Company
800 Connecticut Avenue
P.O. Box 5410
Norwalk, Conn. 06856

Eugene L. Stewart
Counsel of Record
Terence P. Stewart
Geert DePrest
William A. Fennell
STEWART & STEWART
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 785-4185

Terrence Dwyer
Williams, Caliri, Miller & Otley
1428 Route 23
P.O. Box 995
Wayne, N.J. 07470

PACKARD PRESS/LEGAL DIVISION, 1025 CONNECTICUT AVE., NW, WASHINGTON, DC 20036 (202) 659-9600

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Facts Common to Both the ERISA and RICO Claims Remain to be Tried in this Action.

The Continental Group, Inc. is filing this reply to clarify an erroneous characterization of the triable issues below that has been made by the respondents. In their opposition, they assert that "as to the ERISA claim, all that remained was for the trial court to fashion appropriate equitable relief for the class consisting of more than 2,000 individuals." Opposition to Petition for *Certiorari* at 6. They also state that the petitioners "concede that all that remains on plaintiffs' ERISA claims is fashioning the equitable relief which will remedy that violation." *Id.* at 7. These statements erroneously imply that there are no issues of fact common to the Employee Retirement Income Security Act of 1974 (29 U.S.C. §§1001 *et seq.*, "ERISA") and Racketeering Influenced Corrupt Organizations Act (18 U.S.C. §§1961 *et seq.*, "RICO") claims in the action that remain to be tried.

In the trial court order that gave rise to the Petition for Mandamus to the Third Circuit whose action in denying the Petition Continental has asked this Court to review, the court identified four qualifications that must be established in order for a plaintiff to qualify for recovery and then said: "[e]ach person as to whom the said four elements (or any modifications thereof which the court may determine) are established shall be entitled to be made whole under Section 510 of ERISA, 29 U.S.C.A. §1140, for any loss or injury sustained . . . unless the defendants shall establish that, even in the absence of Continental's illegal liability avoidance plan (or program), that person would have been without work at the same time in any event." Petition Appendix at A-3.

Following entry of the order, the plaintiffs moved for summary judgment as to 55 of the more than 2,500 alleged class members. In its October 15, 1987 opinion denying summary judgment, the court found that not all of the 55 had met their burden as to showing that they

met the four criteria and confirmed that "a genuine issue of material fact exists as to whether the subject plaintiffs 'would have suffered the same loss of work even in the absence of the illegal plan.' " Petition Appendix at A-12. Thus remaining to be determined are the questions of whether the vast majority of the alleged class members can establish that they meet all four of the criteria and whether any of the plaintiffs will be entitled to recovery because they would have been laid off even absent any improper motivation for their layoffs.

The fact that these issues remain to be tried is confirmed by the March 7, 1988, order of the trial court (the order is included as the appendix hereto). In the order, the court indicates that the ability of the plaintiffs to establish that they meet the four *Gavalik* criteria is still at issue (at A-2), that Continental's "same loss" defense is still at issue (at A-2). The order also schedules trial of these issues for an initial group of claimants on October 3, 1988 (at A-3).

As discussed in the Petition at 4, both the ERISA and RICO counts of the second amended complaint arise from assertions that plaintiffs were harmed by the alleged unlawful conduct of the defendants. If the plaintiffs are unable to establish for the trier of fact that they meet the four eligibility criteria or if Continental is able to demonstrate that the actions alleged to have harmed the plaintiffs would have been taken even absent any improper motivation, then the respondents will have no basis for recovery of damages under either ERISA or RICO. Such a demonstration would defeat recovery under the pertinent section of ERISA (29 U.S.C. §1132(a)(3)(B), which allows a party to obtain "other appropriate equitable relief" to redress ERISA violations including a violation of the requirements of §1140 prohibiting pension-based discrimination) and under the pertinent section of RICO (18 U.S.C. §1964(c), which allows "any person injured in his

business or property by reason of a violation of section 1962" to sue in U.S. district court and recover treble damages).

Thus facts that go to the heart of both Continental's ERISA defenses and its RICO defenses remain to be determined. Under *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), as demonstrated in its Petition, Continental is entitled to have a jury trial precede any bench trial of the issues of fact which are common to both the RICO and ERISA causes of action; and the jury's findings of fact as to such issues would be binding on the court in any subsequent bench trial. Continental urges this Court to respond positively to its Petition by granting a writ of *certiorari* and re-affirming its constitutional right to a jury trial of common issues of fact in this action preceding any bench trial of such issues.

Dated March 10, 1988

Respectfully submitted,

Eugene L. Stewart
Counsel of Record
Terence P. Stewart
William A. Fennell
Stewart & Stewart
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 785-4185
Attorneys for Petitioner

Of Counsel:

Edwin C. Thomas, III, Esq.
Bell, Boyd & Lloyd
Three First National Plaza
Chicago, IL 60602
(312) 372-1121

Samuel W. Braver, Esq.
Buchanan Ingersoll, P.C.
600 Grant St.
Pittsburgh, PA 15219
(412) 562-8800

Terrence Dwyer, Esq.
Williams, Caliri, Miller & Otley
1428 Route 23
Wayne, NJ 07470
(201) 694-0800

Daniel M. Carson, Esq.
Associate General Counsel
Continental Can Company
800 Connecticut Avenue
P.O. Box 5410
Norwalk, CN 06856
(203) 855-5043

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CECIL MCLENDON, DON VANDERTULIP, JIMMIE CARTHARN, JR., and KONRAD TROJNIAR, on their own and on behalf of all others similarly situated,	Civil No. 83-1340
Plaintiffs,	ORDER
v.	
THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1913; CONTINENTAL CAN COMPANY, INC., a Delaware corporation; THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1982; and KMI CONTINENTAL INC., a New York corporation,	
Defendants.	

This matter having been opened to the court by plaintiffs' motion for clarification and by defendants' motion for entry of proposed order governing future procedures for continued litigation; and the court having considered the written submissions and having heard oral argument; and for the reasons expressed in the accompanying opinion,

IT IS this 7 day of March, 1988, hereby

ORDERED that paragraphs 6 and 9 of the January 7, 1988 order of the Hon. Ronald J. Hedges, U.S. Magistrate, is vacated, and it is further

ORDERED that Continental is granted leave to supplement its December 1, 1987 factual submission in the following respects:

(a) additional evidence from Continental's personnel files;

(b) testimony from Fed. R. Civ. P. 30(b)(6) depositions of Continental's present and former customers and competitors, scheduled or noticed prior to February 8, 1988;

(c) the 1973 Boston Consulting Group study provided to plaintiffs on December 30, 1987 and other documents relating to the 1973 study or diversification in the canning industry;

(d) expert's reports from (i) Dr. Paul Marshall; (ii) Dean Collin Blaydon; (iii) an industrial engineering expert.

And it is further

ORDERED that plaintiffs, within 10 days of receipt of this order, shall submit a list of the 5 plants containing the greatest number of alleged class members, and it is further

ORDERED that, by April 30, 1988, plaintiffs shall explain clearly and fully, for each class member of the five selected plants, the basis for that class member's satisfaction of the four *Gavalik* criteria. Plaintiffs shall specify any documentary and testimonial evidence upon which they may rely in support of their contentions. As to *Gavalik* criteria, the parties shall file any motions pursuant to Rule 56 by May 13, 1988, with a return date of June 13, 1988. And it is further

ORDERED that, by June 15, 1988 (or within 30 days of the court's rulings on any Rule 56 motions concerning the initial *Gavalik* criteria), plaintiffs shall explain clearly and fully, for each class member at the

five selected plants against whom Continental asserts a "same loss" defense, that class member's basis for opposing that defense. Plaintiffs shall specify any documentary and testimonial evidence upon which they may rely in support of their contentions. As to Continental's "same loss" defense, the parties shall file any motions pursuant to Rule 56 by June 24, 1988, with a return date of July 25, 1988. And it is further

ORDERED that discovery shall continue according to the orders of the magistrate. On August 1, 1988, each party will be permitted to make supplementary factual submissions as to the first plant selected for trial (the plant containing the most alleged class members). Such submissions shall be based only upon evidence received in discovery subsequent to prior factual submissions. Any other supplemental submissions by either party may be made only by consent of opposing counsel or with leave of court upon a showing of good cause. And it is further

ORDERED that, by September 15, 1988, the parties shall submit proposed findings of fact and conclusions of law as to the first plant identified for trial. And it is further

ORDERED that trial as to the first selected plant will commence on October 3, 1988. And it is further

ORDERED that provisions for supplementary factual submissions and trial as to the additional four plants initially selected will be established by future orders of the court.

/s/ H. LEE SAROKIN
H. LEE SAROKIN, U.S.D.J.